Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 79-1772

JOSEPHINE CALDERONE,

Appellant,

v.

S. THOMAS FERRIGNO, individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Appellees.

ON APPEAL FROM
THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS OR AFFIRM

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
100 Church Street
New York, N.Y. 10007
Counsel for Appellees

June 4, 1980

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,
of Counsel.

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The Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is manifest that the question on which the decision of

the cause depends is so unsubstantial as not to require further argument.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of a certain provision of Section 5.3.4B of the By-laws of the Board of Education of the City of New York [the "Board"]

This by-law provides, in pertinent part, that any teacher who appeals from an unsatisfactory rating shall be "entitled to appear in person, to be accompanied and advised by an employee of the board or a representative of the union ..., to be confronted by witnesses, to call witnesses and to introduce any relevant evidence." The section also

section also provides that "[t]he advisor may not be an attorney." The above mentioned procedures are also to be found in the collective bargaining agreement between the United Federation of Teachers, of which Appellant is a a member, and the Board of Education.

B. The Proceedings Below

The Appellant, after receiving an unsatisfactory performance rating for the academic year 1976-1977, perfected an administrative appeal pursuant to the Board's by-laws. She was denied her request to be assisted by an attorney at the committee review meeting. Contending that the denial deprived her of substantive and procedural due process rights, she instituted the present proceeding to set aside her adverse

rating and for an order directing that she be permitted the assistance of her private attorney. The New York Supreme Court of Kings County, Special Term, by order dated October 6, 1978, dismissed the petition and denied Appellant the relief sought (1a)*. Upon appeal to the Supreme Court, Appellate Division, the court affirmed the decision of the lower court without opinion (19a). 69 AD 2d 901 (2d Dept., 1979). Leave to appeal was subsequently denied by the Appellate Division (21a) (decision not reported) and by the New York Court of Appeals (24a). 49 NY 2d 701 (1980). The Court of Appeals had previously dismissed Appellant's appeal as of right

*Numbers in parentheses refer to pages of Appellant's Appendix.

on the ground that a substantial constitutional question had not been directly involved (22a). 48 NY 2d 974 (1979).

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING CONSIDERATION BY THIS COURT.

Appellant contends that the exclusion of attorneys from §5.3.4B rating review proceedings conducted by the Board of Education violates her right to due process of law. Appellees submit that the prohibition is a rational exercise of the Board's rule-making authority. The review is essentially a fact-finding proceeding, and is not intended to be judicial or quasi-judicial in nature. The teacher's legal rights are not at issue, and no loss of employment or disciplinary action is threatened. No charges have been lodged against Appellant.

See Appeal of Bohrer, 13 N.Y. Educ. Dept. Rep. 56, 58 (1973); cf. Morrisey v. Brewer, 408 U.S. 471 (1972) and In re Groban, 352 U.S. 330 (1957) (FRANKFURTER, J. concurring).

In the context of parole revocation hearings, this Court has found that, on balance, the introduction of counsel may be more detrimental than helpful to the decision-making process, and upheld the exclusion of attorneys. See Gagnon v. Scarpelli, 411 U.S. 778, 787-788 (1973). A fortiori, the presence of attorneys at rating review proceedings is similarly unwarranted. Cf. Downing v. LeBritton, 550 F. 2d 689, 692 (1st Cir. 1977).

While not entitled to legal representation, Appellant can take advantage of the assistance of a union representa-

tive or fellow employee, and, in addition, is permitted to be confronted by witnesses, to call witnesses, and to introduce any relevant evidence. By-laws §5.3.4B. Under the circumstances, this is all the process that should be due. See Toney v. Reagan, 467 F. 2d 953 (9th Cir., 1972), cert. den. sub nom., Mabey v. Reagan, 409 U.S. 1130 (1973); Teachers United For Fair Treatment v. Anker, 445 F. Supp. 469, 477 (E.D.N.Y., 1977); Hecht v. Monaghan, 307 N.Y. 461 (1954); Matter of McAulay v. Board of Educ., 46 AD 2d 84 (1st Dept., 1974).

Based upon the authorities cited above, this appeal does not present a substantial federal question.

III

Conclusion

Wherefore, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of New York.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
100 Church Street
New York, N.Y. 10007
Counsel for Appellees.

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,
of Counsel.